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Supreme Court of the United States

OCTOBER TERM, 1960

No.

GEORGE K. HEEBNER, JR. and RUTH S. HEEBNER,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above cause on June 23, 1960 (App. p. 13a)* affirming a decision of the Tax Court of the United States (P.A. 128a).

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*The references to the record before the Court of Appeals consist of the appendix to the brief filed by petitioners (P.A.). Citations to (App.) refer to the appendix to this petition.

OPINIONS BELOW

The opinion of the Tax Court is reported at 32 T.C. 1162. The opinion of the Court of Appeals is reported at 280 F.2d 228.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 23, 1960 (App. p. 13a). A timely petition for rehearing was denied on July 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Internal Revenue Code of 1939, as amended. Section 117, Capital Gains and Losses.

> "(a) *Definitions.*—As used in this chapter—
>
> "(1) Capital Assets.—The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
>
> "(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; . . ."

QUESTION PRESENTED

Does the statutory phrase "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" as applied to the construction industry, comprehend a single sale of land and a building and the assignment of a lease covering occupancy of the bulding solely because the vendor is

engaged in the business of providing construction services?

STATEMENT

In September 1951, petitioner* purchased a parcel of ground and agreed to lease to the Nash-Kelvinator Sales Corporation a building that was to be constructed on the land by a corporation of which petitioner was president and controlling stockholder. Subsequently, because of a Federal Reserve Board Regulation which precluded satisfactory financing, petitioner in February 1953 conveyed the land and the building to the Prudential Insurance Company of America together with an assignment of the Nash-Kelvinator lease covering the building.

This was the first and only time that petitioner had ever sold either a building or a parcel of land or a combination of the two (P.A. 88a). Nor had petitioner's construction corporation, which built the building, ever purchased or sold any land or buildings or combinations thereof (P.A. 69a). More important from the point of view of the Federal tax laws, the tax on the profit realized from construction of the building was paid by the corporation at ordinary income tax rates. The profit on the sale to Prudential was attributable solely to the value of the land and the lease agreement. The profit realized on the construction of the building was not, and is not, in issue.

The court below held that the gain realized by petitioner on the sale to Prudential as a matter of law

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*The word petitioner refers to George K. Heebner, Jr. Ruth S. Heebner is a party to this action on the basis of Mr. and Mrs. Heebner's having filed a joint Federal income tax return.

resulted in ordinary income on the ground that the property was held by petitioner primarily for sale to customers in the ordinary course of his business of performing services in the construction industry. The court found—what has never been disputed—that petitioner's business was that of a "package builder." Both common knowledge and the record show that a "package builder" is one who is hired to build a building for another, to arrange for architectural services and to assist the owner in obtaining desirable financing (P.A. 69a). In other words, a "package builder" is one who performs the entire package of services necessary to construct a building for the owner. The profitable performance of such services results in ordinary income. A "package builder" neither buys nor sells the land on which he builds. He does not own the building he constructs, nor does he enter into lease agreements covering the occupancy of the building. The court nevertheless concluded that the property sold to Prudential was held by petitioner primarily for sale to customers in the ordinary course of his trade or business simply because he was engaged in the business of performing construction services.

The court below stated that this construction of the statutory phrase was dictated by the opinion of this Court in *Corn Products Refining Company* v. *Commissioner*, 350 U.S. 46.

REASONS FOR GRANTING THE WRIT

The decision of the court below misapplied the opinion of this Court in *Corn Products Refining Company* v. *Commissioner*, *supra*, and in so doing erroneously construed one of the most important

provisions of the Federal tax laws so as to deny capital gains treatment to the petitioner contrary to the legal principles applied to taxpayers in other industries.

The statutory basis of this cause had its origin in 1921 when Congress limited the rate of taxation upon gain derived from the sale of "capital assets," thus giving rise to a separate category of taxable income. The Revenue Act of 1921, Sec. 206, 42 Stat. 232, 233, defined "capital assets" to mean "property acquired and held by the taxpayer for profit or investment" and then proceeded to exclude such categories of property as inventory items, stock in trade and property held for personal consumption. This statutory framework has been generally continued. Thus, Section 117 (a) of the Internal Revenue Code of 1939 defined "capital assets" by referring in the first instance to "property held by the taxpayer (whether or not connected with his trade or business)" after which the statute provides four specific categories of property which are excluded from the definition of "capital assets." The most important of these and the one here in issue is that of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

In the instant case, the court below denied the capital gains treatment accorded by the statute on the ground that the property sold by petitioner was held by him primarily for sale to customers in the ordinary course of his business despite the conceded fact that petitioner had never before and has not since sold such property or held such property for sale. The court found that its conclusion was dictated by the

opinion of this Court in *Corn Products Refining Company v. Commissioner, supra.*

In *Corn Products* the Court was called upon to determine whether sales of corn futures by a manufacturer of various corn products gave rise to capital gain. The Corn Products Refining Company manufactured starch and sugar. As protection against rising corn prices, the company purchased corn futures at harvest time and took delivery under these contracts in the event that spot corn prices rose. It sold the remainder of the futures in early summer if no price rise was imminent. The Court held that the gain on the sale of the futures was ordinary income. In reaching this conclusion, the Court stated:

> "We find nothing in this record to support the contention that Corn Products' futures activity was separate and apart from its manufacturing operation. . . . Under these facts it is difficult to imagine a program more closely geared to a company's manufacturing enterprise or more important to its successful operation."
>
> ". . . Admittedly, petitioner's corn futures do not come within the literal language of the exclusions set out in that section [§ 117]. They were not stock in trade, actual inventory, property held for sale to customers or depreciable property used in a trade or business. But the capital-asset provision of § 117 must not be so broadly applied as to defeat rather than further the purpose of Congress. . . . Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. . . ." (pp. 50-51)

The Court was thus concerned with profits arising from the everyday operation of a business. The Court

was *not* concerned with whether property was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. In fact, the Court was very careful to point out that the corn futures did not come within any statutory exclusion. To put it most simply, *Corn Products* deals with only one issue—property regularly bought and sold in the everyday operation of a business but not sold to customers.

The court below, however, misconstrued *Corn Products* and in so doing carved out from the statute a broad class of property, the sale or exchange of which has traditionally been held to give rise to capital gain. This can be seen most clearly from the undisputed facts of the case. Petitioner's trade or business was that of a builder. He had never constructed buildings for sale nor bought or sold real estate (P.A. 69a, 88a). The profit on the construction of the building sold to Prudential was taxed in full to petitioner's corporation, and it was only the construction of the building which was in any way related to petitioner's trade or business. The land and lease which actually produced the profit were in no way connected with petitioner's trade or business.

In holding that the property sold to Prudential was held by petitioner primarily for sale to customers simply because petitioner is in the building business, the court below confused the building with the business. If petitioner had been in some other business, or one of the professions, there is no question but that he would have been entitled to capital gain on this transaction. As a builder, petitioner was

denied capital gain although no building services and no builder's profit were involved. If the decision of the court below is allowed to stand, then persons in the building industry will be denied capital gain opportunities not involving a builder's profit. This result conflicts with all of the statutory gloss.

The courts have consistently permitted capital gains treatment in other industries even where the property sold is identical with that held by the taxpayer for sale in the ordinary course of his trade or business. A good example of this is the allowance of capital gains treatment on the sale of stocks and bonds by securities dealers. *Vaughn* v. *Commissioner*, 85 F.2d 497 (2d Cir. 1936), *cert. denied* 299 U.S. 606. (The requirements as to identification of securities are now codified as part of the Internal Revenue Code of 1954, see Section 1236.) A further example of this policy is reflected in *United States* v. *Bondurant*, 245 F.2d 265 (6th Cir. 1957), where a taxpayer in the business of selling cotton, purchased bales of cotton, identified them, and placed them in a public warehouse. The court held that the profit realized on the sale of the cotton was taxable as capital gain. Registered real estate brokers have also been permitted to treat profit from the sales of real property as capital gain. *Thomas* v. *Commissioner*, 254 F.2d 233 (5th Cir. 1958).

The automobile industry has given rise to much litigation in this area. The courts have frequently held that vehicles used for rental purposes and regularly disposed of by the taxpayer after a certain period of time or extent of use do not constitute property held by the taxpayer for sale to customers in the ordinary course of his trade or business.

Philber Equipment Corp. v. *Commissioner*, 237 F.2d 129 (3d Cir. 1956). The courts have reached this same conclusion in connection with the sale by automobile dealers of "company cars". *Duval Motor Co.* v. *Commissioner*, 264 F.2d 548 (5th Cir. 1959). Moreover, in *Massey Motors, Inc.* v. *United States*, 364 U.S. 92, this Court took it as admitted that where a new car dealer annually sold every car that he had either rented or used as a company car, such sales were of "depreciable assets rather than ordinary stock in trade" which for tax purposes resulted in capital gain.

Indeed, the statute simply does not permit the courts to treat as capital transactions sales of property of the same type regularly sold in the taxpayer's trade or business, and deny such treatment to a member of the construction industry when he makes a single isolated sale of property in no way related to his trade or business. Certainly the building industry should not be singled out for tax treatment less favorable than that accorded taxpayers in other industries. Neither the statute nor any decided case supports what the court below has done. The opinion of this Court in *Corn Products Refining Company* v. *Commissioner, supra*, has received varying interpretations it is true but until the opinion below, no one had ventured to say that *Corn Products* required that whenever a taxpayer sells property unrelated to his business, he must as a matter of law, be regarded as holding that property "primarily for sale" to customers in the ordinary course of his business.

The decision of the court thus conflicts with the statute as well as the decisions of this Court and lower courts. The building industry, without legal

justification, has been placed in a capital gain position inferior to that enjoyed by taxpayers in other industries. The Court should act to correct the distortion of the plain meaning of this most important Federal revenue provision and to insure that the tax laws are applied uniformly.

CONCLUSION

For the foregoing reasons this petition for a Writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

GEORGE K. HEEBNER, JR. and RUTH S. HEEBNER, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

No. 13173

United States Court of Appeals
Third Circuit.

Argued May 12, 1960

Decided June 23, 1960.

On Rehearing July 29, 1960.

Before GOODRICH, McLAUGHLIN and STALEY, Circuit Judges.

STALEY, Circuit Judge.

This taxpayer's petition for review of a decision of the Tax Court primarily poses the question whether the profit realized on the disposition of certain property was properly treated by the Tax Court as ordinary income rather than capital gain. Two subsidiary issues were also raised in the Tax Court, one relating to an expense deduction and the other to a constructive dividend. The former issue was withdrawn on appeal and the latter need be considered only if it is determined that the Tax Court erred in holding that the profit realized was ordinary income.

The facts may be summarized as follows: George K. Heebner, Jr. and Ruth S. Heebner[1] filed a joint individual income tax return on a cash basis for the calendar year 1953, upon which the Commissioner of Internal Revenue

[1] The relevant facts relate to the property and activities of George K. Heebner, Jr., referred to in the opinion as "taxpayer." His wife, Ruth S. Heebner, is involved in the petition for review only because a joint return was filed.

determined a deficiency of $14,372.68. The taxpayer, an architect, was individually engaged in the building and construction business during the years 1951 through 1958. In addition, during the tax year in question, 1953, he was employed as president of George K. Heebner, Incorporated, ("Corporation") organized under Pennsylvania law in 1934 to engage in design and construction of industrial and commercial buildings. Taxpayer owned 89.54 per cent of the Corporation's outstanding stock and the remainder was owned by his two brothers.

Taxpayer was one of a group of builders who early engaged in "package" building. This term has been applied to a builder who not only constructs a building pursuant to the specifications of a customer but also undertakes other facets of the building project, such as design, location of a suitable site, financial arrangements, and delivery of a completed project to the prospective purchaser. Not all projects undertaken by the taxpayer, either individually or through the Corporation were of the package variety, but those that were, were undertaken with the purpose of getting his "foot in the door as a builder." Taxpayer derived substantial taxable income from his individual building operations during the years 1949 to 1953.

In May or June, 1951, two Philadelphia real estate brokers informed taxpayer that Nash-Kelvinator Sales Corporation was desirous of locating offices and a warehouse in the Philadelphia suburban area. Acting upon this information, taxpayer undertook a complicated series of negotiations. Initially he approached the Baltimore and Ohio Railroad in order to acquire a building site adjacent to the railroad's right-of-way in the Sharon Hill, Pennsylvania, section. The title to the property, which the taxpayer subsequently acquired, was held of record by the Schuylkill Improvement Land Company of Philadelphia, a wholly-owned subsidiary of the Baltimore and Ohio Rail-

road. Contact was also made with Nash-Kelvinator in an attempt to ascertain the desired specifications for the warehouse. More than a month prior to August 30, 1951, taxpayer approached the Frankford Trust Company concerning a construction loan and as early as July 13, 1951, contacted Prudential Insurance Company representatives in regard to a proposed sale of the completed premises.

The existence in 1951 of Regulation X promulgated by the Board of Governors of the Federal Reserve System initially presented some difficulties. This regulation limited the amount of any mortgage loan on non-residential real estate to a maximum of 50 per cent of the value of the property. However, this regulation did not apply to short-term construction loans made to a person "other than the owner" of non-residential real estate, provided there was a take-out commitment from a financially responsible institution within the twenty-four month period permitted for construction loans. Since the taxpayer required a mortgage substantially in excess of 50 per cent, he took title to the Sharon Hill site in his individual name and had the construction contract performed by the Corporation. Thereafter, the Corporation, not the taxpayer, could apply for the construction loan in its name and Regulation X would be no hindrance. In considering the application for the loan, however, Frankford Trust Company appeared equally interested in taxpayer's financial stability and required his personal financial statements as well as those of the Corporation.

In short order, taxpayer negotiated the following transactions: In July, 1951, he obtained an option on the building site and on September 5, 1951, the Schuylkill Improvement Land Company agreed to convey the Sharon Hill site to him for $45,000. On September 4, 1951, Frankford Trust Company agreed to make the construction loan in the amount of $600,000 to the Corporation. A preliminary lease was obtained from Nash-Kelvinator in July of 1951 and on August 14, 1951, Nash-Kelvinator committed itself

to lease the completed warehouse. Prudential obligated itself in August to purchase the land and building upon completion and confirmed the arrangement on September 11, 1951. Finally, on September 28, 1951, taxpayer entered into an agreement with the Corporation whereby the latter agreed to construct the building, commencing within thirty days of September 28, 1951, the building in no event to cost more than $550,000, including the profit. The commitment of each of the participants with whom taxpayer negotiated was dependent and conditioned upon a commitment of one or more of the other participants; e.g., Frankford Trust Company agreed to make the construction loan to the Corporation only upon condition that Nash-Kelvinator would agree to lease and Prudential would agree to purchase the site and building upon completion.

Taxpayer reported to and obtained the approval of Prudential as regards each significant detail of the supervision and construction of the Sharon Hill project from its inception in May or June, 1951, until final transfer February 15, 1953. The form of agreement to lease, the cost estimate, the specifications, and the settlement sheet were each submitted to Prudential. In addition, following enactment by the Commonwealth of Pennsylvania on December 27, 1951, of legislation, effective February 1, 1952, taxing all real estate transfers at a rate of one per cent, taxpayer entered into negotiations with Prudential concerning it. Initially he proposed that there be "a conveyance immediately by George K. Heebner, Jr., of the ground, with the building in the process of erection." However, following discussion and further correspondence it was agreed that the $6,500 transfer tax would be paid one-half by taxpayer and one-half by Prudential.

On August 1, 1952, Nash-Kelvinator took possession of the warehouse pursuant to its lease with taxpayer and thereafter paid rent to him until February 15, 1953. Subsequently, on January 19, 1953, taxpayer informed

Prudential that on or about February 15, 1953, he would tender a deed to Prudential. Prudential inspected the premises and on February 16, 1953, taxpayer conveyed the property to Prudential for the sum of $650,000. The selling price of the ground and building was $650,730.06, less settlement expenses of $10,741.40, for a net figure of $639,988.66 paid to taxpayer.[2]

In its 1953 income tax return, the Corporation reported that it had realized a gross profit of $18,168.24 resulting from construction of the Sharon Hill project. The Commissioner of Internal Revenue determined that under the construction agreement the Corporation had realized a profit of $28,668.24 and allocated a further $10,500 to the Corporation. This was agreed to by the Corporation. However, the Commissioner went further and, recognizing that this additional amount had been paid to the taxpayer at the settlement, treated it as a constructive dividend to the taxpayer.

Taxpayer paid the real estate brokers who first brought the lease possibility to his attention a commission of $21,000. In his 1953 return he deducted $20,650 of this amount as an ordinary expense deduction, but the Commissioner disallowed the deduction and determined that the amount represented an additional cost of the Sharon Hill project. On appeal taxpayer has conceded that the Commissioner is correct as regards this item.

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[2] Cost Basis to Taxpayer:

Item	*Cost Basis*	*Percentage relation of cost of each item to total cost of all items*
Ground	$ 45,899.71	10.123%
Lease	21,000.00	04.631%
Building	386,487.34	85.246%
Total Cost	$453,387.05	100.00%

Finally, taxpayer treated the gain from the sale of the property as capital gain. The Commissioner, as previously indicated, took issue with this contention. The Tax Court concluded that "The work performed by [taxpayer] in connection with the development and final disposition of the Sharon Hill project, to-wit, site selection, assistance in design and lease negotiation, financing arrangements, and building construction was in keeping with his regular business operations and the resulting profit in the amount of $193,544.49 was derived from property held by him primarily for sale to customers in the ordinary course of his trade or business." Accordingly, the gain from the transaction was held not to represent proceeds of a capital asset transaction within Section 117(a)(1)(A) of the Internal Revenue Code of 1939.[3]

Taxpayer in his brief makes an elaborate attack on the finding of the Tax Court. However, we need not consider individually each of the five separate arguments, for they are merely varying ways of analyzing the thorny problem posed by the capital gain provisions in light of the specific facts of this appeal.

Initially, we note that the parties appear to disagree as to what the proper scope of our review is in matters of this nature. This is especially significant as regards the Tax Court's finding that the profit "was derived from property held * * * primarily for sale to customers in the ordinary

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[3] "§ 117. Capital gains and losses

"(a) Definitions. As used in this chapter—

"(1) Capital assets. The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

"(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." 26 U.S.C.A. § 117.

course of his trade or business." As we recently stated in Pennroad Corporation v. Commissioner of Internal Revenue, 3 Cir., 1958, 261 F.2d 325, 328, certiorari denied sub nom. Madison Fund, Inc. v. Commissioner of Internal Revenue, 1959, 359 U.S. 958, 79 S.Ct. 797, 3 L.Ed.2d 766:

> "• • • It is this finding which taxpayer attacks here. Of course it is in the nature of an ultimate finding of fact and, since such finding is but a legal inference from other facts, this court has held that it is subject to review free of the restraining influence of the 'clearly erroneous' rule applicable to ordinary findings of fact made by the trial court. [Citing cases.] However, where the ultimate fact reasonably flows from the basic facts and especially where the basic facts are persuasive of the ultimate fact so found, this court will not disturb the finding of the trial court."

Taxpayer contends that he is entitled to capital gain treatment on the profit resulting from the sale of the Sharon Hill warehouse inasmuch as he was not engaged in the business of selling real estate; it was not a sale in the ordinary course of the building business; a sale of real estate "in keeping with" the building business is not a sale in the ordinary course of that business; the gain was not a builder's profit but was derived from a sale; and the transaction was initiated as an investment.

In our consideration of the problem we must be guided by the Supreme Court's recent analysis of Section 117 in Corn Products Refining Co. v. Commissioner of Internal Revenue, 1955, 350 U.S. 46, 52, 76 S.Ct. 20, 24, 100 L.Ed. 29, where it was stated:

> "• • • Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income. It was intended 'to relieve the taxpayer from • • • excessive tax burdens on gains resulting from a conversion of

capital investments, and to remove the deterrent effect of those burdens on such conversions.' Burnet v. Harmel, 287 U.S. at page 106 [53 S.Ct. at page 75]. Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term 'capital assets' in § 117."

Heeding this admonition, we recently said in Kaltreider v. Commissioner of Internal Revenue, 3 Cir., 1958, 255 F. 2d 833, 838:

"As to the finding with respect to the nature of taxpayers' business, these principles are well-settled:

"'There is no fixed formula or rule of thumb' for determining whether property is held primarily for sale to customers in the ordinary course of the taxpayer's business and 'Each case must, in the last analysis, rest upon its own facts.' No single factor or test is dispositive. Factors considered are: (1) the purpose for which the property was acquired; (2) the purpose for which it was held; (3) improvements, and their extent, made to the property by taxpayers; (4) frequency, number and continuity of sales; (5) the extent and substantiality of the transactions; (6) the nature and extent of taxpayer's business; (7) the extent of advertising to promote sales, or the lack of such advertising; and (8) listing of the property for sale directly or through brokers." (Citations omitted.)

In any specific case individual elements become more prominent than others. It does not suffice for taxpayer to vigorously point to the relative infrequency of sales while overlooking other elements. We must look to the general nature of the business and determine whether the profits arose from its everyday operation. Although taxpayer now attempts to minimize the significance of his testimony in the Tax Court, it is clear as regards what has been termed "package building."

"Q. Now, were you among the first contractors in this area to conceive and develop the notion of package building, sir? A. We weren't the first, no, sir.

"Q. I say, were you among the first? A. I can't answer that, because I don't know. I would say that I thought I was first, but I found out years later a lot of other people had been doing it but didn't publicize it or advertise it.

"Q. And about when did you first begin to enter the field of package building, sir? A. When you say package building, I suppose my architectural training and background since I went with my father, in a limited way I was doing package building, but I didn't so advertise it.

"Q. You were doing it but didn't advertise it. What was the nature of package building? A. The package is to take the burden off somebody, some busy executive, trying to have a new building around his operation.

"Q. In other words—let me understand you, sir—you conceive the notion, and it was your business, to get specifications for a company or individual, and to arrange the whole package to the best of your ability—a plot of land, financing, building, and deliver that whole package to the prospective purchaser, or whoever was to have the building. Is that reasonably accurate? A. No, it is not accurate.

"Q. Tell me what is accurate. A. I'll tell you why. You might go out and sell that, but you would only do one out of fifty the package building, but you will get your foot in the door as a builder.

"Q. But at any rate, you did engage in that type of business, package building, didn't you? A. Yes."

Although only one out of fifty projects was of a "package" nature, he did not deny that he held himself out as a package builder. This was a going aspect of his business, and the Sharon Hill project was but a manifestation of it. Just as in Lakin v. Commissioner of Internal Revenue, 4 Cir.,

1957, 249 F. 2d 781, and Penn'road Corporation v. Commissioner of Internal Revenue, 3 Cir., 1958, 261 F. 2d 325, the sale of real estate was an aspect of the prime business inextricably interwoven for the purpose of furthering the prime or main activity, the sale of real estate here was but one aspect of the entire transaction. There is absolutely no reason for treating the profit from the building transaction here any differently because one small aspect of it involved a sale of land. The land under this factual pattern was merely another commodity, such as lumber, steel and bricks, which went into the finished product, the warehouse and offices for Nash-Kelvinator to be sold to Prudential. In fact there was a condition in the deed from the Schuylkill Improvement Land Company that the taxpayer would construct the warehouse for Nash-Kelvinator upon the site within two years; if he failed to do so, Schuylkill expressly reserved the right to repurchase the site for the $45,000 to be paid by taxpayer.

It is worthy of note that both taxpayer and Prudential considered that the land was but a small part of this entire transaction. A memorandum to his home office from Joseph M. Russell, Production Manager for Prudential in the Philadelphia area, was admitted by the Tax Court pursuant to 28 U.S.C. § 1732. It related to the request of taxpayer that Prudential assume half the cost of the one per cent transfer tax enacted by the Commonwealth of Pennsylvania. Russell recommended that the request be granted and stated:

> "This case is subject to this additional tax, which amounts to $6,500, and the seller, George K. Heebner, has asked us if we will assume at least one-half the share of the cost.
>
> "We feel that we should accede to Mr. Heebner's request in view of the fact that this deal was primarily negotiated on our behalf with George K. Heebner, the builder and technically was considered as the seller.

"In reality Mr. Heebner considers he is building the property for us, which is to be occupied by Nash and that he is, in fact, only the temporary owner."

Taxpayer objects to the admission of this document, asserting that Russell would not be permitted to testify in this regard himself and therefore the document is inadmissible. On the contrary, the testimony of Russell would be admissible for the purpose of showing the understanding of Prudential as to the transaction in question, for it is not only taxpayer's intention that is relevant but also the objective facts of the transaction. Further, it would be admissible as an exception to the hearsay rule, as an admission against interest on the part of the taxpayer, for Russell recorded not his idle opinion or reflections but rather a fact, the position presented to him by the taxpayer in support of his request for sharing of the transfer tax. Thus, inasmuch as the testimony would have been admissible, the Federal Business Records Act, 28 U.S.C. § 1732, makes the document admissible.

A study of the facts set forth hereinabove, which are fully supported by the record, clearly indicates that, contrary to taxpayer's assertion, he never initiated the Sharon Hill transaction as an investment. On the contrary, due to the restrictions of Regulation X or for other reasons, it was clear to him that the technical purchase and holding of the real estate in question was merely one step in effectuating the overall transaction. The fact that the taxpayer himself or through controlled corporations has three industrial plants that he leases cannot transmute what was clear on the facts as to the Sharon Hill property. Taxpayer's argument really comes down to this—he would have liked to have held the building for leasing purposes but could not because of the mortgage restrictions imposed by Regulation X. This, however, makes it abundantly clear that from the very beginning the plan as conceived by the taxpayer included, as it had to, the sale of the property upon com-

plétion of construction. Thus, although the taxpayer may have had the desire to retain the property as an investment, he at no time had the intention to do so.

All of this, when considered in the light of the Corn Products case, leads ineluctably to the conclusion that here, the profit resulted "from the everyday operation of a business."

The decision of the Tax Court will be affirmed.

On Rehearing

Before Biggs, Chief Judge, and Goodrich, McLaughlin, Kalodner, Staley, Hastie and Forman, Circuit Judges.

Per Curiam.

The petition for rehearing filed by the attorneys for the petitioners contains intemperate and gross language. The use of such language by members of the bar in a petition to the court verges upon contemptuous conduct. A repetition of such conduct on the part of counsel will bring disciplinary action. The Clerk will be ordered to strike from the petition the language in question.

The petition will be denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,173

GEORGE K. HEEBNER, JR., and RUTH S. HEEBNER, *Petitioners*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition to Review a Decision of the Tax Court of The United States

Present: GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

June 23, 1960

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JAMES R BROWNING

No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE K. HELBNER, JR., AND RUTH S. HELBNER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court is reported at 32 T.C. 1162. The opinion of the court of appeals is reported at 280 F. 228.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1960 (Pet. 13a), and the petition for rehearing was denied on July 29, 1960. (Pet. 12a). The petition for a writ of certiorari was filed on October 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the determination of both courts below that profit realized by the taxpayer from the sale of a "package" building project was derived from property held by him primarily for sale to customers in the ordinary course of his business, and that consequently the profit was taxable as ordinary income rather than as capital gain.

STATUTE INVOLVED

SEC. 117 [as amended by Sec. 210(a), Revenue Act of 1950, c. 994, 64 Stat. 906]. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

(26 U.S.C. (1952 ed.) 117)

STATEMENT

The taxpayer[1] has been in the construction business in and around Philadelphia since 1930, engaging in the design and erection of industrial and com-

[1] The taxpayer's wife, Ruth S. Heebner, is a party only by virtue of having filed a joint return with him.

mercial buildings (R. 130a). He operated both individually and, after 1934, as the dominant figure in George K. Heebner, Inc. (R. 130a). The taxpayer was president of the corporation and held 89.54% of its stock, the balance being owned in equal parts by his two brothers. As part of his construction business, the taxpayer offered "package" building services to the public, which involved procuring a suitable site for a proposed building, designing and constructing the building, arranging financing and related services, and finally delivering the completed project to the prospective purchaser (R. 130a).

Early in 1951, the taxpayer learned that Nash-Kelvinator Sales Corporation desired to rent an office and warehouse building in the Philadelphia area. He located a suitable site for such a building in Sharon Hill, Pennsylvania, adjacent to the Baltimore and Ohio right of way, which the railroad was willing to sell. He then negotiated a series of interdependent agreements by which (1) Nash-Kelvinator bound itself to lease the land and building when completed (according to specifications) for a twenty-five-year period at a total rental of $1,043,250 (R. 42a); (2) Prudential Insurance Company agreed to purchase the building when completed for the sum of $650,000, upon condition that a lease with Nash-Kelvinator had been executed on terms satisfactory to it; (3) George K. Heebner, Inc., agreed with the taxpayer, as an individual, to construct the building at a maximum cost of $550,000; (4) Frankford Trust Company agreed to make a construction loan of $600,000 to George K. Heebner, Inc., repayable in twenty-four months, upon

the condition that Prudential committed itself to purchase and Nash-Kelvinator to lease the building upon completion; and (5) the railroad agreed to sell the land at the price of $45,000, reserving the right to repurchase at that price if the building were not completed and leased to Nash-Kelvinator within two years. The taxpayer then took conveyance of the land from the railroad, the building was constructed between September 1951 and August 1952, at which time Nash-Kelvinator took possession as lessee, and the property was conveyed to Prudential in February 1953 at the agreed price of $650,000 (R. 134a–140a). In each significant detail of the construction of the project, from its inception in 1951 until the final transfer in 1953, the taxpayer reported to and obtained the approval of Prudential as the ultimate purchaser for whom the project was being constructed (R. 137a).

On his 1953 income tax return, taxpayer reported his profit from the sale of the project as a long-term capital gain. The Tax Court sustained the Commissioner's determination that the profit was taxable as ordinary income (R. 141a–144a). The court of appeals affirmed (Pet. 1a–12a).

ARGUMENT

The question presented is one of fact, the evidence supports the determination of both courts below, and there is no conflict or other reason for further review.

1. This case presents the oft-litigated issue of whether sales profits are taxable as ordinary income or as capital gain. Section 117(a) of the Revenue

Code of 1939, *supra*, p. 2, excludes from the definition of capital assets "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." In the absence of any showing that improper legal criteria have been applied, the question whether property falls within the excepted category must be resolved in the light of the particular facts, and this Court has consistently refused to review cases presenting this factual issue.[2]

2. The record fully supports the conclusion of both courts below that the property involved here was held primarily for sale in the ordinary course of the taxpayer's business, and that the profit realized from its disposition was therefore taxable as ordinary income. The taxpayer, which had been engaged in the building business since 1930, sometimes undertook "package" building projects—a term applied to a builder who, in addition to constructing a building according to a customer's specifications, procures a satisfactory site, arranges suitable financing, and then delivers the completed project to the customer (R. 130a). In this case, the taxpayer in 1951 undertook a "package" building project to construct a warehouse building for Prudential Insurance Company as purchaser, and to obtain Nash-Kelvinator Sales Corporation as lessee.

[2] See, *e.g.*, *Pool* v. *Commissioner*, 251 F. 2d 233 (C.A. 9), certiorari denied, 356 U.S. 938; *S.E.C. Corp.* v. *United States*, 241 F. 2d 416 (C.A. 2), certiorari denied, 354 U.S. 909; *Frankenstein* v. *Commissioner*, 272 F. 2d 135 (C.A. 7), certiorari denied, 362 U.S. 918; *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C.A. 6), certiorari denied, 352 U.S. 928; *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5), certiorari denied, 342 U.S. 829.

The project was consummated in 1953 (the taxable year), at which time the building was conveyed to Prudential (R. 134a–140a). Each phase of the project, from its inception to completion, was reported to, and obtained the approval of, Prudential, the prospective purchaser (R. 137a).[3] On the basis of these evidentiary facts, the details of which are recited in its opinion, the Tax Court was fully justified in concluding that "[t]he work performed by [the taxpayer] in connection with the development and final disposition of the Sharon Hill project, to wit, site selection, assistance in design and lease negotiation, financing arrangements, and building construction was in keeping with his regular business operations," and that the resulting profit "was derived from property held by him primarily for sale to customers in the ordinary course of his trade or business" (R. 141a–142a).

The taxpayer's contention (Pet. 7) that the transaction which produced the profit in question was "in no way connected with petitioner's trade or business," but was a separate and unrelated investment transaction, is refuted by the record. It rests on the unwarranted assumption that component interdependent parts of the transaction—acquiring the land and negotiating the lease—are to be divorced from construction of the building and viewed as separate transactions. As both the Tax Court and the court of appeals emphasized (R. 142a–144a; Pet. 6a–12a), however, the transaction which produced the profit was a "pack-

[3] The evidence also shows that the taxpayer considered himself as only the "temporary owner" of the land and building which was to be conveyed to Prudential (Pet. 11a).

age" deal forming an integral part of the taxpayer's building business. Both courts below having decided this factual issue against the taxpayer, their concurrent finding is entitled to finality here. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51; *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

3. The taxpayer mistakenly asserts (Pet. 4–7) that the court below "misapplied" this Court's holding in *Corn Products Co.* v. *Commissioner, supra.* It was there held that gains realized by a manufacturer of corn products from futures transactions were taxable as ordinary income, rather than as capital gains, because the transactions were "an integral part of its business." 350 U.S. at 50. In so holding, the Court stated that (*id.* at 52):

> Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income. * * * Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term "capital assets" in § 117. * * *

Far from having disregarded these principles, as the taxpayer charges, the court below was "guided by" and expressly followed them (Pet. 7a–8a). The

court simply held, that, as in *Corn Products*, "the profit resulted 'from the everyday operation of a business' " (Pet. 12a).

The taxpayer relies (Pet. 8–9) upon cases holding that a dealer in property is not precluded from purchasing similar property for his own account, as an investor, and that profit from the sale of such property constitutes capital gain. But the same principles were applied in those cases as were applied by the courts below in this case. The difference in result reflects a difference in factual situations rather than any disagreement in principle since the courts in those cases found that the property sold had actually been held as an investment. In this case, as both courts below found, no showing was made that the transaction in question constituted an outside investment, *i.e.*, a transaction separate from the taxpayer's normal business activities. Instead, as the Tax Court observed, there is "nothing in the record which would justify a finding that [the taxpayer] ever intended this project solely as an 'investment' transaction and not as one where the eventual disposition was not in his usual course of business" (R. 143a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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